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In the Supreme Court of the United States

DAVID JENNINGS, *et al.*,

Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF CALIFORNIA, MASSACHUSETTS, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

This Court has specified the following questions:

1. Whether the Constitution requires that aliens seeking admission to the United States who are subject to mandatory detention under 8 U.S.C. § 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2. Whether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether the Constitution requires that, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community, whether the length of the alien's detention must be weighed in favor of release, and whether new bond hearings must be afforded automatically every six months.

TABLE OF CONTENTS

Page

Questions presented i

Table of authorities iii

Interests of amici 1

Summary of argument 2

Argument 4

Due process requires substantial procedural protections when the federal government seeks to detain individuals during removal proceedings 4

A. Unnecessary detentions during removal proceedings impose substantial individual and public harms 6

B. This Court's decisions establish a framework for ensuring that government authorities adequately justify civil detentions 11

C. Equivalent protections should apply where the federal government seeks to detain individuals during removal proceedings 14

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Addington v. Texas
441 U.S. 418 (1979) 11, 15

Balbuena v. IDR Realty LLC
6 N.Y.3d 338 (2006) 9

Boumediene v. Bush
553 U.S. 723 (2008) 4, 5, 13

Demore v. Kim
538 U.S. 510 (2003) 15

Foucha v. Louisiana
504 U.S. 71 (1992) ..... *passim*

INS v. Chadha
462 U.S. 919 (1983) 16

Jackson v. Indiana
406 U.S. 715 (1972) 12, 16, 18

Jordan v. De George
341 U.S. 223 (1951) 16

Kansas v. Hendricks
521 U.S. 346 (1997) 14, 15

Korematsu v. United States
323 U.S. 214 (1944) 18

Mathews v. Eldridge
424 U.S. 319 (1976) 18

TABLE OF AUTHORITIES
(continued)

Page

O'Connor v. Donaldson
422 U.S. 563 (1975) 12, 14, 18

Obergefell v. Hodges
135 S. Ct. 2584 (2015) 11

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481 U.S. 739 (1987) ..... *passim*

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533 U.S. 678 (2001) 14, 16, 17, 18

STATUTES

United States Code, Title 8
§ 1226a 19
§ 1537 19

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§ 135.5 9

California Education Code
§ 66021.6 8
§ 68130.5 8
§ 68130.7 8
§§ 70030-70039 8

2001 California Statutes Chapter 814
§ 1(a)(3) 8

2013 California Statutes Chapter 524
§ 1 8

TABLE OF AUTHORITIES
(continued)

Page

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§ 12801.9 8

California Welfare & Institutions Code
§ 13300 9
§ 14007.8 9

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§ 355(2)(h)(8) 8

Washington Revised Code
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United States Constitution
Fifth Amendment 1

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TABLE OF AUTHORITIES
(continued)

Page

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California Immigrant Policy Ctr., *Resilience in an Age of Inequality: Immigrant Contributions to California* (Jan. 23, 2017), http://www.caimmigrant.org/research-and-analysis/contributions-html/..... 7

Ctr. for Am. Progress, *Facts on Immigration Today* (Oct. 23, 2014), https://www.americanprogress.org/issues/immigration/report/2014/10/23/59040/the-facts-on-immigration-today-3/ 9, 10

ICE Worksite Enforcement – Up to the Job?: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary, 112th Cong. (2011) 7

TABLE OF AUTHORITIES (continued)

Page

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Lisa Christensen Gee, et al., The Inst. on Taxation & Econ. Policy, *Undocumented Immigrants' State & Local Tax Contributions* (February 2016), http://www.itep.org/pdf/immigration2016.pdf 7, 8

Nicholas Zill, Nat'l Council For Adoption, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption* (May 2011), https://www.adoptioncouncil.org/files/large/9422a636dfac395 11

Patricia Cortes, *The Effect of Low-Skilled Immigration on U.S. Prices: Evidence from CPI Data*, 116 J. Pol. Econ. 381 (June 2008) 7

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TABLE OF AUTHORITIES
(continued)

Page

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The Federalist No. 84 (Alexander Hamilton) 5

INTERESTS OF AMICI

The States of California, Massachusetts, New York, Oregon, Rhode Island, Vermont, and Washington submit this brief in support of the principle that if the federal government wishes to detain an individual for an extended period during the course of legal removal proceedings, it must justify that decision to a neutral arbiter, on individualized grounds and subject to appropriate periodic review. To the extent that the federal statutes at issue here require or authorize the federal Executive to detain and confine individuals for prolonged periods without providing these basic safeguards, they fail to comport with the Constitution's fundamental command that "[n]o person shall ... be deprived of ... liberty ... without due process of law." U.S. Const. amend. V.

The amici States have a strong interest in ensuring that non-citizens who seek to establish a legal right to remain in the United States and who pose no demonstrable danger to society or risk of flight are not unnecessarily subject to prolonged detention while that issue is resolved. California alone is home to nearly 25% of the United States' foreign-born population, including 25% of all legal permanent residents and 21% of undocumented immigrants.[1] The

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[1] Anna Brown & Renee Stepler, Pew Research Ctr., *Statistical Portrait of the Foreign-Born Population in the United States* (Apr. 19, 2016), http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-the-foreign-born-population-in-the-united-states/; Bryan Baker & Nancy Rytina, Dept. of Homeland Security, Office of Immigration Statistics, *Estimates of the Lawful Permanent Resident Population in the United States: January 2013* at 4 (Sep. 2014), https://www.dhs.gov/sites/default/files/publications/LPR%20Population%20Estimates%20January%202013.pdf; Pew Research Ctr., *Unauthorized immigrant popu-*

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amici States combined account for nearly 17.5 million immigrants, or more than 41% of the Nation's total immigrant population.

As has been true throughout our Nation's history, the vast majority of these individuals pose no threat. On the contrary, they are integral members of our communities who contribute to our economies and civil societies. Of course, the amici States support the lawful detention of demonstrably dangerous individuals. But many of those facing removal pose no such concern. And federal statutes or policies that proceed on unjustifiably broad categorical grounds, resulting in needless detentions, cause real harm—not only to the individuals detained but to their families, their employers or employees, their co-workers, their communities, and their States.

SUMMARY OF ARGUMENT

The federal statutes at issue in this case result in the prolonged detention of thousands of individuals every year. While some of these individuals are dangerous or pose a genuine risk of flight, many pose no threat and are firmly-rooted, contributing members of our society. Many have been here since childhood, and many have spouses, children, or other close relatives who are U.S. citizens or permanent residents. They work or run businesses, support families, and pay state and federal taxes. Many have no criminal record, and many others have been convicted of only minor, non-violent offenses. All are seeking to establish, through legal proceedings, that they may not or

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lation trends for states, birth countries and regions (Nov. 3, 2016), http://www.pewhispanic.org/interactives/unauthorized-trends/.

should not be forced to leave the United States. Detaining individuals such as these for extended periods while those proceedings remain pending can be devastating for the detainees, their families, and their communities.

Sometimes it is necessary to impose these costs. As this Court has made clear, however, "[i]n our society liberty is the norm." *United States v. Salerno*, 481 U.S. 739, 755 (1987). In other contexts involving civil detention, very familiar to the States, this Court has repeatedly held that government authorities may not deprive an individual of his or her liberty for any extended period without first convincing a neutral arbiter that there is an adequate justification for the detention, and then providing additional procedural protections such as periodic review. These are routine and essential requirements of due process—designed to protect both individuals and our society from the arbitrary or abusive use of executive power. And they apply even in circumstances where the case for detention can be quite strong. Similar safeguards are surely appropriate here.

What due process requires can vary considerably depending on particular circumstances. Here, the basic measures sought by respondents would strike an appropriate balance between the interests of individuals and those of the federal government. Requiring that executive authorities bear the burden of justifying any prolonged detention to a neutral decision-maker, based on each detainee's individual circumstances, is a typical minimum of due process. Requiring the government to introduce evidence justifying prolonged detention, taking due account of the length of a proposed or actual detention, and providing a mechanism for periodic review of continued de-

tention would all comport with the burdens that this Court has typically imposed on state and federal authorities in the context of other civil detentions. And respondents have made clear that they do not oppose the appropriate use of other mechanisms, such as supervised release or financial bonds, to reduce the risk that some individuals might abscond or commit a crime before the resolution of removal proceedings.

However the precise balance may be struck in particular situations, the amici States urge this Court to make clear that non-citizen members of our communities, lawfully contesting efforts by the federal government to force their removal from this country, are entitled to the same sort of fundamental procedural protections that are afforded to individuals threatened with civil detention by federal or state authorities in other contexts. Anything less creates too great a risk that federal authorities will, in the name of upholding the Nation's immigration laws, themselves violate one of "freedom's first principles"—the "freedom from arbitrary and unlawful restraint." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008).

ARGUMENT

DUE PROCESS REQUIRES SUBSTANTIAL PROCEDURAL PROTECTIONS WHEN THE FEDERAL GOVERNMENT SEEKS TO DETAIN INDIVIDUALS DURING REMOVAL PROCEEDINGS

"In our society, liberty is the norm," with "carefully limited exception[s]." *Salerno*, 481 U.S. at 755. "Freedom from bodily restraint has always been at

the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Among "freedom's first principles," the "freedom from arbitrary and unlawful restraint" is "[c]hief." *Boumediene*, 553 U.S. at 797. Indeed, "the practice of arbitrary imprisonments, [has] been, in all ages," among "the favorite and most formidable instruments of tyranny." The Federalist No. 84 (Alexander Hamilton). And that threat is at its apex when the detention at issue concerns politically unpopular or marginalized groups. *See, e.g., Boumediene*, 553 U.S. at 732.

In light of these concerns, this Court has held that the Due Process Clause requires certain protections in various contexts in which government authorities seek to detain and confine individuals other than as punishment for a duly proven crime. *See, e.g., Salerno*, 481 U.S. at 748-749. In doing so it has always carefully balanced individual and governmental interests. *E.g., id.* at 748-751. Here, the individual (and state) interests in avoiding unnecessary detention are very strong. The countervailing governmental interests supporting detention *in some cases* are likewise strong. In other contexts, familiar to the States, this Court has reconciled these interests by permitting extended "regulatory" detentions, *id.* at 746—but only where the detaining authority can make a sufficient affirmative showing that the deprivation of liberty is clearly justified in each particular case. That approach strikes an appropriate balance between individual and governmental interests, and the Court should apply it here.

A. Unnecessary Detentions During Removal Proceedings Impose Substantial Individual And Public Harms

The statutes at issue in this case result in the prolonged detention of thousands of individuals every year. In many of these cases, there is no good basis for concluding that the individual involved is likely either to abscond or to create any danger to the community while removal proceedings remain pending. As the court of appeals concluded, most members of the respondent class have "strong ties to this country: Many immigrated to the United States as children, obtained legal permanent resident status, and lived in this country for as long as twenty years before [federal authorities] initiated removal proceedings." Pet. App. 20a.

These individuals are frequently valuable members of our local, state, and national communities. They are employees and employers, family members and heads of household, caregivers, congregants, students, and active participants in a wide range of social organizations. Many are married to citizens or lawful permanent residents, have children born in this country, and hold steady jobs that provide for themselves and their families. Pet. App. 20a. A substantial portion of the class has no criminal history; and of those who have been convicted of any crime, more than half served a sentence of less than six months. Resp. Supp. Br. 6; *see also* Pet. App. 20a ("To the extent class members have any criminal record ... it is often limited to minor controlled substances offenses."). Moreover, most individuals in removal proceedings are seeking, in those proceedings, to demonstrate or secure a legal entitlement to remain in the United States. And a significant num-

ber are successful in that effort. *See* Pet. App. 19a (71% of respondent class members sought relief from removal, and one-third of those who did were successful); *see also* Resp. Supp. Br. 4-6 (nearly two-thirds of Arriving Subclass members and two-fifths of Mandatory Subclass members received favorable decisions in removal proceedings).

Similarly, individuals facing removal proceedings frequently play an important role in our economies. Undocumented immigrants, for example, account for approximately $181 billion of California's gross domestic product each year.[2] Non-citizens also make up a substantial portion of the workforce in our States in key job sectors such as agriculture, information technology, and high-tech manufacturing.[3] And they tend to complement, rather than compete with, non-immigrant employees, filling jobs that other workers often decline to take.[4] Moreover, immigrants contribute substantially to state and local coffers by paying property, sales, and income taxes.[5]

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[2] California Immigrant Policy Ctr., *Resilience in an Age of Inequality: Immigrant Contributions to California* at 3 (Jan. 23, 2017), http://www.caimmigrant.org/research-and-analysis/contributions-html/.

[3] Audrey Singer, Brookings Inst., *Immigrant Workers in the U.S. Labor Force* (Mar. 15, 2012), https://www.brookings.edu/research/immigrant-workers-in-the-u-s-labor-force/.

[4] *ICE Worksite Enforcement – Up to the Job?: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 101-112 (2011) (testimony of Cato Institute scholar Daniel Griswold); *cf.* Patricia Cortes, *The Effect of Low-Skilled Immigration on U.S. Prices: Evidence from CPI Data*, 116 J. Pol. Econ. 381, 414 (June 2008).

[5] Lisa Christensen Gee, et al., The Inst. on Taxation & Econ. Policy, *Undocumented Immigrants' State & Local Tax*

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Indeed, undocumented immigrants alone account for approximately $11.64 billion in state and local taxes each year nationwide.[6]

Far from seeking to promote or assist in their removal, many States have taken a range of actions to foster the integration of immigrants into local communities and to safeguard their legal rights. California's public universities, for example, charge in-state tuition and provide financial aid to non-citizen students with significant ties to the State, regardless of their current status under federal immigration law. Cal. Educ. Code §§ 66021.6, 68130.5, 68130.7, 70030-70039. California adopted these measures because they benefit both the student and the State: by making college affordable, these fair tuition policies "increase[] the [S]tate's collective productivity and economic growth." 2001 Cal. Stats. ch. 814, § 1(a)(3). Washington's public universities likewise permit undocumented students with substantial connections to the State to pay in-state tuition. Wash. Rev. Code § 28B.15.012(2)(e); *see also* N.Y. Educ. Law § 355(2)(h)(8) (extending in-state tuition to certain undocumented students). California also allows individuals who are not lawfully present in this country to obtain driver's licenses, based on the Legislature's finding that this measure improves road safety. 2013 Cal. Stats. ch. 524, § 1; *see also* Cal. Veh. Code § 12801.9. In addition, California has provided funds to pay for legal services for unaccompanied minors in federal removal proceedings, in an

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Contributions at 2 (February 2016), http://www.itep.org/pdf/immigration2016.pdf.

[6] *Id.* at 1.

effort to ensure that the legal process they receive is fair. Cal. Welf. & Inst. Code § 13300. And New York's labor protections extend to undocumented workers. *See Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 362 (2006).[7]

Because so many non-citizens create value—not danger—in our communities, prolonged detention in connection with federal removal proceedings will often burden both individuals and States in ways that are unjustified and substantial. From a public perspective, removing individuals from productive work or social engagement is doubly costly: Detention is not only expensive, but forces idleness. It can cause detainees to lose their jobs or their homes—consequences that are especially harsh for those who return to their communities after obtaining a favorable result in removal proceedings. It also puts a double strain on social resources, reducing state and federal tax receipts while increasing the demand for public support for those financially dependent on detainees.

Most significantly, prolonged detention imposes great human costs. Roughly one in five undocumented immigrants is married to a U.S. citizen or legal permanent resident.[8] And nearly half of all undocu-

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[7] *See also* Cal. Bus. & Prof. Code § 135.5 (state licensing boards may not deny professional licenses on account of citizenship or immigration status, based on Legislature's finding that it is in the State's "best interests" to provide licenses to such persons); Cal. Welf. & Inst. Code § 14007.8 (extending California's Medicaid program to undocumented minors).

[8] Ctr. for Am. Progress, *Facts on Immigration Today* (Oct. 23, 2014), https://www.americanprogress.org/issues/immigration/report/2014/10/23/59040/the-facts-on-immigration-today-3/.

mented immigrants are parents to minor children who live in this country.[9] Approximately 5.5 million children, including 4.5 million U.S. citizens, have at least one parent who is an undocumented immigrant.[10] Similarly, many of the 13.1 million legal permanent residents who live in the United States have family ties to this country.[11] Detention of any non-citizen for prolonged (or even simply uncertain) periods can throw the individual's family into economic disarray: without the detainee's income, the family may be unable to afford groceries or forced into homelessness.[12] Detention of a parent can have particularly harsh consequences for children: some struggle in school, and others may be forced into foster care.[13] The latter result can prove especially costly to the States, which spend approximately $26,000

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[9] *Id.*

[10] Pew Research Ctr., *Unauthorized Immigrant Population: National and State Trends, 2010* at 13 (Feb. 1, 2011), http://www.pewhispanic.org/files/reports/133.pdf.

[11] Jie Zong & Jeanne Batalova, Migration Policy Inst., *Green-Card Holders and Legal Immigration to the United States* (Oct. 1, 2015), http://www.migrationpolicy.org/article/green-card-holders-and-legal-immigration-united-states (66% of immigrants who obtained legal permanent resident status in 2013 did so on the basis of a family relationship).

[12] Ajay Chaudry, et al., The Urban Inst., *Facing Our Future: Children in the Aftermath of Immigration Enforcement* at 29-33 (Feb. 2010), http://www.urban.org/sites/default/files/publication/28331/412020-Facing-Our-Future.pdf.

[13] *Id.* at 49-51; Susan D. Phillips, et. al., *Children in Harm's Way: Criminal Justice, Immigration Enforcement, and Child Welfare* at 22 (Jan. 2013), https://firstfocus.org/wp-content/uploads/2013/02/Children-in-Harms-Way.pdf.

per year on each foster child.[14] Prolonged detention also disrupts some of society's most important relationships by separating spouses from each other and parents from children. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) ("'The first bond of society is marriage; next, children; and then the family.'").

Because prolonged civil detentions during federal removal proceedings can impose such heavy personal and social costs, they demand equivalently weighty and personal justifications.

B. This Court's Decisions Establish A Framework For Ensuring That Government Authorities Adequately Justify Civil Detentions

This Court has considered a variety of contexts in which government authorities seek to detain individuals for extended periods for reasons other than punishment for proven crimes.[15] In those contexts—very familiar to the States, which have the primary government role in most such situations—the Court has consistently made clear that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979) (civil commitment for mental health treatment).

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[14] Nicholas Zill, Nat'l Council For Adoption, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption* at 3 (May 2011), https://www.adoptioncouncil.org/files/large/9422a636dfac395.

[15] *Cf. Foucha*, 504 U.S. at 80 ("A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution.").

Notably, these precedents address situations in which the case for detention can be very strong. When an individual has a severe mental illness, detention for treatment may be necessary to protect public safety—and, indeed, may be viewed as advancing the objective interests of the individual himself. Where a person is facing criminal prosecution for a serious crime, the public interests in community safety and an effective judicial process may again weigh heavily in favor of detention pending a full trial. Nonetheless, this Court has narrowly confined the circumstances under which a State may detain such individuals for more than a few days without individualized review by a neutral arbiter.

As to civil commitment for the mentally ill, for example, in our society a State may not "lock[] a person up against his will and keep[] him indefinitely" without affirmatively demonstrating, to a neutral decision-maker, not only that the individual is mentally ill but that detention is necessary to avoid a risk of physical harm to the detainee or others. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). Likewise, if a criminal defendant is found not guilty by reason of insanity, even if the crime was serious or violent, the government may detain the individual for supervision and treatment only so long as it can show that he remains both mentally ill and personally dangerous. *See Foucha*, 504 U.S. at 77-78. And if a defendant is found incompetent even to stand trial, the State still may not detain him, absent separate civil commitment proceedings, for more "than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *see Foucha*, 504 U.S. at 79.

These due process protections are not without cost. Providing individualized consideration and neutral adjudication in thousands of cases every year can be time-consuming and expensive. *Cf. Boumediene*, 553 U.S. at 769 ("Compliance with any judicial process requires some incremental expenditure of resources."); *but see* J.A. 588 (parties' stipulation that cost of bond hearings pending completion of removal proceedings is not greater than cost of detaining class members). Moreover, requiring the government to justify any prolonged detention no doubt results in some harms caused to individuals and communities that might have been prevented if government authorities could act based on less or different evidence, or rely more on stereotypes and categorical assumptions, or continue detentions based on executive determinations without periodic review by a neutral arbiter. Consistently, however, this Court has balanced the interests involved in these situations in a manner that favors the basic principle of freedom from restraint.

Although that principle imposes burdens on even well-intentioned public authorities, the amici States recognize that it also protects the liberty of our people. We strongly endorse this Court's continuing vigilance to ensure that the Constitution likewise adequately restrains prolonged detentions of non-citizens by federal immigration authorities. This is especially important at a time when non-citizens have become the repeated targets of open fearmongering and political attacks. Particularly at such a time, the courts must demand proper and individualized justification for any prolonged executive detention. "Mere public intolerance or animosity" toward "those whose ways are different ... cannot constitu-

tionally justify the deprivation of a person's physical liberty." *O'Connor*, 422 U.S. at 575.

C. Equivalent Protections Should Apply Where The Federal Government Seeks To Detain Individuals During Removal Proceedings

This Court has recognized that cases dealing with other types of civil detention are relevant in the immigration context. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Rejecting a broad assertion by the federal government that "alien status itself [could] justify indefinite detention" of a non-citizen already held to be removable, the Court emphasized that it has previously countenanced civil detention only "in certain special and 'narrow' nonpunitive 'circumstances' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" *Id.* at 690, 692 (citation omitted; quoting *Foucha*, 504 U.S. at 80, and *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)). Even where there is such a justification, the Court has held that due process requires the use of "constitutionally adequate procedures to establish the grounds for ... confinement." *Foucha*, 504 U.S. at 79.

The Court should now make clear that the Constitution provides equivalent protections for non-citizens whom federal authorities seek to detain for prolonged periods during removal proceedings. No doubt the federal government will be able to show that some individuals must be detained because they pose a danger to the community or a risk of flight. It should not, however, be permitted to detain individual non-citizens for prolonged periods on the basis of group classifications, assumptions, or stereotypes.

The strong personal, community, and public interests in avoiding lengthy and unnecessary immigration-related detentions warrant the same sort of procedural protections that our society provides for other civil detainees.

The most basic of these protections is the right to an individualized assessment, before a neutral adjudicator, of the asserted need for the detention. *See, e.g.*, *Foucha*, 504 U.S. at 77-83 (emphasizing need for individualized showing of proper, current grounds for detention). In these proceedings, the detaining authority normally has the burden of justifying any extended detention, which it typically must carry by providing clear and convincing evidence of a current basis and need for the detention. *See Addington*, 441 U.S. at 433 (mental illness); *Foucha*, 504 U.S. at 86 (continued detention based only on asserted danger to community); *Salerno* 481 U.S. at 751 (describing statutory protections for pretrial arrestees).

In addition, the Court has considered the length of detention a highly relevant factor in the due process analysis. *See Salerno* 481 U.S. at 747 (pretrial detention permissible in part because of "stringent time limitations of the Speedy Trial Act"); *Demore v. Kim*, 538 U.S. 510, 513, 529-530 (2003) (detention permissible in part because it typically lasted for only a "brief period"). Where detention is or may be prolonged, the Court has also looked to the availability of periodic review to ensure that the grounds asserted by the government to justify the detention remain current and valid. *See Hendricks*, 521 U.S. at 363-364 (post-sentence detention of sexually violent criminals allowed in part because of required annual reassessment); *Foucha*, 504 U.S. at 77-83 (need for new showing when conditions or grounds for detention

change); *cf. Jackson*, 406 U.S. at 738 (detention on ground of incompetence to stand trial "must be justified by progress toward" regaining competency; otherwise, government must establish new ground for continued detention).

The respondents in this case seek essentially the same basic protections. The federal petitioners have responded that special features of the immigration context justify providing less protection for non-citizens in removal proceedings. *See, e.g.*, U.S. Supp. Br. 33-34. The amici States offer the perspective of coordinate governments that also routinely face the need to balance considerations of personal liberty against those of public safety and orderly legal procedure. Moreover, as discussed above, many of the non-citizens whose protection is at issue are also state residents and members of our communities. From these perspectives, the federal government's arguments are unpersuasive.

Federal primacy in immigration matters, for example, does not justify denying non-citizen state residents basic due process protections. Even in this area, exercises of federal power are "subject to important constitutional limitations." *Zadvydas*, 533 U.S. at 695.[16] These should include the requirement of individualized determinations of flight risk and dangerousness pending the completion of removal proceedings.

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[16] *Cf. INS v. Chadha*, 462 U.S. 919, 940-942 (1983) (Congress must chose a "constitutionally permissible means of implementing" its authority over immigration law); *Jordan v. De George*, 341 U.S. 223 (1951) (deportation statute must satisfy void-for-vagueness doctrine).

Requiring such an individualized assessment likewise does not impinge on federal authority to control admission into the United States. *See* U.S. Supp. Br. 19-21. Allowing non-citizens who do not pose demonstrable risks of dangerousness or flight to continue their ordinary activities while the government seeks to establish that they should be deported—and they seek to establish that they should not—will not change the legal standards governing those questions, or confer any otherwise unavailable right to enter or remain in the United States.[17] Similarly, providing standard due process protections does not require allowing individuals subject to removal proceedings to live "at large." *See* U.S. Supp. Br. 20. Respondents have made clear that they do not contest the government's ability to subject them, during such proceedings, to appropriate monitoring short of physical detention. *See* Resp. Supp. Br. 36-37; *see also Zadvydas*, 533 U.S. at 695-696.

Finally, that some persons who are not detained may then abscond or commit crimes does not justify detaining all non-citizens based on broad categorical judgments, without an individualized demonstration of substantial risk. *See* U.S. Supp. Br. 44-45. The amici States of course share concerns about public safety and improper flight—in this context as in others. In case after case, however, this Court has made

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[17] It is worth recalling that a significant number of individuals who are placed in removal proceedings do establish a right to remain. For example, more than 71% of those in the respondent class have sought relief from removal, and roughly one-third of those who have sought it have prevailed. *See* Pet. App. 19a; *see also* Resp. Supp. Br. 4-6 (nearly two-thirds of Arriving Subclass members and two-fifths of Mandatory Subclass members prevail at removal proceedings).

clear that categorical fears are not a constitutionally sufficient basis for extended detentions. Indeed, a central principle of the civil detention cases is that a decision so profoundly restricting personal liberty must be based on an individualized demonstration of real need—not on group stereotypes or unsubstantiated fears. *Compare Korematsu v. United States*, 323 U.S. 214, 218-219 (1944). This is the standard our society applies in the face of risks potentially posed by those charged with but not yet convicted of serious crimes, and by those whose mental illness could make them dangerous or has even already led to criminal acts. *See, e.g., Salerno*, 481 U.S. at 750 (arrestees); *O'Connor*, 422 U.S. at 574 (mentally ill); *Jackson*, 406 U.S. at 738 (individual incompetent to stand trial); *Foucha*, 504 U.S. at 83 (individual previously acquitted based on legal insanity). We should not allow the federal government to apply a lower standard in making detention decisions concerning non-citizen state residents potentially subject to removal.

Of course, the procedures required by due process can vary considerably depending on particular circumstances. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). In a few situations, for example, there might be genuine questions of "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Zadvydas*, 533 U.S. at 696. But those situations are the exception, not the norm, and they are not involved here.[18] It is vital that vague invocations

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[18] For instance, this case does not involve detention of (continued...)

of phrases such as "national security" or "terrorism" not be allowed to justify erosion of fundamental liberties such as the freedom from physical restraint. Speaking as governments themselves, the amici States believe that the basic procedural protections sought by respondents will, in most cases, strike an appropriate balance between individual liberty interests and the federal government's need to detain noncitizens in removal proceedings who present a genuine risk of flight or community danger. And any substantially lower constitutional standard risks empowering federal authorities to subject our noncitizen residents and community members to unjustified or even arbitrary detentions.

(...continued)
suspected terrorists under a special statutory provision. *See* Pet. App. 5a-6a; *see also* 8 U.S.C. §§ 1226a, 1537.

CONCLUSION

If this Court reaches the constitutional questions presented by this case, it should hold that the Constitution requires appropriate procedural protections when the federal government seeks to detain individuals during removal proceedings for prolonged periods.

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